STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. WATSON, Assignee of THOMAS BROWN & SON ROOFING & SIDING COMPANY,

Plaintiff-Appellant,

v

TRAVELERS INDEMNITY COMPANY, a/k/a TRAVELERS PROPERTY CASUALTY and TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Defendants-Appellees.

UNPUBLISHED
April 12, 2005

No. 253127
Isabella Circuit Court
LC No. 02-001841-CZ

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff David J. Watson, as assignee for Thomas Brown & Son Roofing & Siding Co. ("Thomas Brown"),[1] appeals as of right the order granting defendant Travelers Indemnity Company summary disposition under MCR 2.116(C)(10). This case arises out of defendants' refusal to provide coverage to Thomas Brown, for injuries to plaintiff. We affirm.

In September 1999, Thomas Brown was engaged in a roofing project at Central Michigan University, which contracted with Thomas Brown for the removal and replacement of the roof on a residence hall. After the old roofing materials were removed, Thomas Brown proceeded to lay the foundation for the new roof. This involved installing insulation and then spraying on an adhesive, called Burmastic, to bond the insulation to the roof deck. Burmastic is a liquid tar or asphalt-like adhesive that Thomas Brown stored in fifty-five-gallon drums. Thomas Brown either brought the drums to the site or had them delivered by a vendor.

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[1] Thomas Brown and plaintiff entered into a release and settlement agreement in the underlying suit. The agreement provided for a consent judgment in the underlying suit in the amount of $1 million and further assigned to plaintiff any and all claims that Thomas Brown may have against defendants.

During the roofing process, Thomas Brown placed a wooden pallet with several fifty-five-gallon drums filled with diesel fuel on the roof of the residence hall. The diesel fuel, which Thomas Brown always brought to its work sites, was used to aid with the clean up of the equipment and hoses used in the application of the Burmastic adhesive. The Burmastic and diesel fuel mixture that resulted from the cleaning process was discharged back into the drums. On September 27, 1999, one of the laborers was loading a drum onto the wooden pallet. During this process, the laborer knocked over another drum that contained five to ten gallons of the Burmastic/diesel fuel mixture. The drum fell over the edge of the roof and hit a dumpster located on the ground below. As a result of the impact, the lid of the drum came off, and its contents splashed on the side of the residence hall and through the open window of plaintiff's dormitory room.

At the time of the incident, Thomas Brown was covered by a commercial general liability policy of insurance ("CGL policy"), issued by defendants. Thomas Brown notified defendants of plaintiff's potential claim and requested coverage under the CGL policy. However, defendants denied coverage. Defendants asserted that coverage was excluded by an exclusionary provision in the policy that stated in pertinent part as follows:

> This insurance does not apply to
>
> * * *
>
> e. Pollution
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
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> * * *
>
> (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
>
> (i) If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor;
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> * * *
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Plaintiff filed suit against Thomas Brown, alleging that he suffered bodily injury as a result of inhaling fumes from the Burmastic/diesel fuel mixture that had entered his room. And, defendants continued to deny Thomas Brown's request for coverage.

Thomas Brown, subsequently, filed a complaint against defendants, seeking, in pertinent part, a declaratory judgment that defendants owed a duty to defend and indemnify Thomas Brown in the underlying action. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the pollution exclusion clause precluded coverage in connection with Watson's suit. Thomas Brown responded, and argued that case law established that the pollution exclusion clause was inapplicable under the circumstances, i.e., where the "materials were still confined within the general area of their intended use."

The trial court heard oral arguments on the motion, and agreed with defendants that *Carpet Workroom v Auto Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2002 (Docket No. 223646), was directly on point. The court noted that, although *Carpet Workroom* was an unpublished opinion, it drew principles from a published opinion, *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 632 NW2d 525 (2001). Accordingly, the trial court granted defendants' motion for summary disposition because the contract language was clear and unambiguous that the exclusion applied where there had been a release of a pollutant.

The primary dispute here is disagreement over which case provides the appropriate rule of law to apply under the circumstances to determine whether the pollution exclusion cause of the subject insurance policy in this case barred coverage to the insured. Defendants argue that this Court should follow several decisions from this Court supporting that the claim is barred by the exclusion clause: *McGuirk Sand & Gravel v Meridian Mut Ins Co*, 220 Mich App 347, 354; 559 NW2d 93 (1996); *McKusick, supra*; and *Carpet Workroom, supra*. But plaintiff argues that this Court should follow a decision from the federal Sixth Circuit, *Meridian Mut Ins Co v Kellman*, 197 F3d 1178 (CA 6, 1999), in which the Sixth Circuit found that a pollution exclusion clause did not bar coverage because the clause was ambiguous. We agree with defendants.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. The motion tests the factual support for a claim, and when reviewing the motion, the court must consider all the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); see also MCR 2.116(G)(4). If contractual language is clear, its construction is a question of law for the court that is subject to de novo review. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Hafner v DAIIE*, 176 Mich App 151, 156; 438 NW2d 891 (1989).

In construing an insurance contract, courts must first determine whether coverage exists. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993). "An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Thus, "the court looks to the contract as a whole and gives meaning to all its terms." *Harrington, supra* at 381. A court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. *Henderson v State Farm Fire & Casualty Co*, 460

Mich 348, 353-354; 596 NW2d 190 (1999). Absent ambiguity, a contract must be construed to adhere to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998).

An insurer has a duty to defend if the allegations of the underlying suit arguably fall within the coverage of the policy. *Royce v Citizens Ins Co*, 219 Mich App 537, 543; 557 NW2d 144 (1996). There is no dispute with respect to coverage in this case. Under such circumstances the court must then determine whether an exclusion precludes coverage because an insurance company must not be held liable for a risk that it did not assume. *Henderson*, *supra* at 353-354; *Libralter Plastics*, *supra* at 485. Coverage is lost if any of the policy's exclusions apply to an insured's particular claims, and it is the insurer's burden to prove that an exclusion applies. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995); *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998). Exclusionary clauses in insurance policies are strictly construed in favor of the insured. *Century Surety Co*, *supra* at 83.

In the proceedings below plaintiff disputed whether the Burmastic/diesel fuel mixture even qualified as a "pollutant" under the policy, but plaintiff has not raised this issue again on appeal. Regardless, the trial court did not err in concluding that the Burmastic/diesel fuel mixture qualified as a pollutant because it is a liquid irritant or contaminant, which includes chemicals and fumes.

In *McGuirk Sand & Gravel*, *supra* at 351, 353-354, this Court explained that the majority of courts have recognized that the unambiguous purpose of "absolute pollution exclusion" clauses, just like the one at issue in this case, is to absolutely eliminate *all* claims alleging damage caused by pollution. The Court held that the plaintiff's claim for injuries that occurred when contaminants spilled from a storage tank was barred by the pollution exclusion clause, and that the spill clearly constituted an "escape" of the liquid contaminant. *Id*. at 349, 356.

In *McKusick*, *supra* at 330-331, the plaintiffs were injured from exposure to toxic chemicals that were released when a high-pressure hose delivery system failed. The issue in *McKusick* was whether "the 'discharge, dispersal, seepage, migration, release or escape' of the 'pollutant' must be located in or affect a particular area to make the pollution exclusion provision applicable," i.e., whether it must qualify as traditional environmental pollution. *Id*. at 337. The Court noted that other jurisdictions were split on "whether pollution exclusion clauses should be limited in application to traditional forms of environmental pollution," but rejected the argument that pollution exclusion clauses only apply to traditional environmental pollution. *Id*. at 333, 338. The Court provided that rather then treating the terms, "discharge, dispersal, seepage, migration, release or escape" as "environmental terms of art," the terms must be interpreted using their common meanings. *Id*. at 338. "There are no exceptions to the exclusion and no limitations regarding its scope, including the location or other characteristics of the discharge." *Id*. at 338. The Court held that the pollution exclusion clause unambiguously and absolutely barred the plaintiffs' claims. *Id*. at 332, 333, 334.

It is irrelevant that *McKusick* was a products liability action, whereas this case is a negligence action because nothing in the language of the pollution exclusion distinguishes between these types of cases. See *Carpet Workroom*, *supra* at slip op, p 10 n 2 (stating that the difference "is one without import considering that the pollution exclusions clearly and unambiguously exclude coverage and do not otherwise distinguish between the proper use of the

polluting substance or negligent use of the polluting substance.").[2] *Carpet Workroom*, *supra*, was a consolidated case, involved pollution exclusion clauses identical to the one at issue here. In each case, the plaintiff was injured when fumes from chemicals being used to install flooring overcame her. *Id*. at slip op, pp 2-4. A panel of this Court held that the bodily injury sustained by the plaintiffs "clearly arose out of the discharge, dispersal, migration, release or escape of pollutants defined to include any gaseous irritant or contaminant, such as vapor, fumes, or chemicals." *Id*. at slip op, pp 11-12. Further, the panel in *Carpet Workroom* cited *McKusick*, stating that it disposed of several pertinent issues:

> (1) the pollution exclusions contained in both insurance policies are clear and unambiguous; (2) a "pollutant" need not necessarily result in widespread contamination of land, air or other natural resources for the exclusion to apply and bar coverage. Thus, the exclusion is not limited to traditional environmental contamination claims; (3) the policy terms "discharge," "dispersal," "seepage," "migration," "release," and "escape" are to be accorded their plain, ordinary and commonly used meanings. This Court will not "judicially engraft" any exception or limitation onto the unambiguous policy language and (4) because the pollution exclusion is clear and unambiguous, this Court's speculation concerning the intent of the insurance industry in formulating the pollution exclusion at issue herein is neither required nor invited. [*Id*. at slip op, pp 10-11.]

The Court also noted that the pollution exclusion clauses contained no limitations and that this Court is not permitted "to concoct a limitation where none exists." *Id*. at slip op, p 12.

Plaintiff argues that the trial court erred by relying on the unpublished decision of *Carpet Workroom* when the published Sixth Circuit decision in *Kellman* is more on point than both *Carpet Workroom* and *McKusick*. In *Kellman* the Sixth Circuit held that an exclusion clause did not bar coverage because the clause was ambiguous with respect to whether "it covered injuries caused by toxic chemicals in the immediate area of their intended use." *Kellman*, *supra* at 1184.

Although a Michigan court may choose to agree with the analysis of a federal court decision, "federal court decisions are not precedentially binding on questions of Michigan law." *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000). And, more importantly, we must follow prior published decisions of this Court and our Supreme Court. MCR 7.215(J); *Holland Home v Grand Rapids*, 219 Mich App 384, 557 NW2d 118

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[2] Pursuant to Michigan Court Rule, an unpublished opinion is not binding under the rules of stare decisis, MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588; 513 NW2d 773 (1994), but when the case law is limited we can view these opinions as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003). And when a party chooses to cite an unpublished opinion, a court may follow that decision if it finds the reasoning persuasive. See *Plymouth Stamping v Lipshu*, 168 Mich App 21, 27-32; 424 NW2d 530 (1988). Accordingly, the trial court was entitled to rely on *Carpet Workroom* on the ground that it was factually similar and legally persuasive in its interpretation of binding case law.

(1996). The published decisions of *McGuirk Sand & Gravel* and *McKusick* unquestionably dispose of the issues in this case, and we are bound to follow them. Further, the trial court did not err in relying on *Carpet Workroom* because that case succinctly summarizes the applicable rules established in *McGuirk Sand & Gravel* and *McKusick*. Additionally, the absolute pollution exclusion clearly and unambiguously barred coverage for an injury that resulted from the "discharge, dispersal, seepage, migration, release or escape of pollutants."

Therefore, in this case, where plaintiff was injured after inhaling fumes from chemicals that were splashed into his dorm room, the pollution exclusion clause bars coverage because the incident clearly qualifies as the "discharge, dispersal, seepage, migration, release or escape of pollutants." Under the binding decisions of this Court, the pollution exclusion clause is absolute and does not allow for us to hold otherwise on the ground that the pollution was not "traditional environmental pollution" or because the injuries were caused by toxic chemicals in the immediate area of their intended use.

Lastly, contrary to plaintiff's arguments, the doctrine of reasonable expectations should not apply in this case because in *McKusick*, *supra* at 338-339, we rejected the argument that an insured's reasonable expectations can circumvent the pollution exclusion clause and create coverage. The clause could easily have been discovered on examination of the policy. *Id*. at 339. An insured's reasonable expectations have "no application when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). Furthermore, Thomas Brown's president testified that he did not read the policy. One who signs a contract cannot seek to avoid it on the ground that he or she did not read it or thought that it was different in terms. *Paterek v 6600 Limited*, 186 Mich App 445, 450; 465 NW2d 342 (1990).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage